

In the
United States Court of Appeals
For the Ninth Circuit

FREDERICK I. RICHMAN,

Appellant,

vs.

LYDA TIDWELL, ROY E. HALLBERG, as Receiver
of all the real and personal property constituting
the former Richman Trust, and JOHN WHYTE,
attorney for Receiver,

Appellees.

LYDA TIDWELL,

Appellant,

vs.

FREDERICK I. RICHMAN, ROY E. HALLBERG, as
Receiver of all the real and personal property con-
stituting the former Richman Trust, and JOHN
WHYTE, attorney for Receiver,

Appellees.

CONSOLIDATED BRIEF ANSWERING
APPELLANT TIDWELL'S BRIEF AND REPLY TO
RESPONDENTS' HALLBERG AND WHYTE BRIEF

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No. 14702

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Foreword

Brevity, and appellant Tidwell's conclusion (p. 38) that "the order of the court settling the account of the receiver, awarding fees and distributing the balance of the funds is substantially correct", although she "should be allowed a credit for the escrow costs and charges", justify designating her "respondent" or

“Tidwell”. Respondents Hallberg and Whyte will be referred to as “Receiver”. In replying to Tidwell appellant will again consider the appeal in the following order: I. Distribution of funds under the Settlement Agreement; and II. Fees. Thence, the respondents’, Hallberg and Whyte, who were required to be impartial fiduciaries, charges of untrue, argumentative statement of the case and argument, will be categorically answered.

I. Reply to Tidwell Brief.

A. The Settlement Contract and Acts of the Parties.

Logical presentation prohibits, (if it is necessary), answering Tidwell’s unjustified assertions such as: frequent assertions of fraud on the part of Richman; suffice it to say that the court in its Memorandum Decision (R. 5), made no mention of fraud on the part of Richman, but stated (R. 5):

“It now appears that plaintiff has made out her case on her theory of undue influence in the inception of the arrangement, and the only reason for setting forth the limitations immediately above described is to explain to any reviewing court that this case has been tried upon a limitation as described.”; or remarks such as

“a nice ‘fat’ fee when we realize that the 10% fee Richman seeks for the month of November, 1953, amounts to \$3104.33” (pp. 11-12), or: “Mrs. Tidwell has been mulcted of thousands of dollars in fees”, (p. 12), or the

“. . . loss she sustained over a period of eight years in the payment of exorbitant fees” (p. 14), except to again observe that the premise to the Settlement Agreement was “. . . , the court decision gave your client (Tidwell) what she was offered about two and one-half years ago before suit was filed, namely, a division of the trust” (R. 139), and that during appellant’s eight year management of the trust as agent its assets increased from \$375,000 to \$1,200,000. (R. 603-604). It is interesting to note that Tidwell makes no objection to the Receiver’s fees and expenses although it has been shown (Op. Br. 42) that the Receiver’s fees and expenses were greater than the fee of Richman who paid his own expenses. Also the expenses allowed the Receiver and his attorney are definitely contrary to the court’s own statement: (R. 188):

“It is noted that the total of receiver’s and attorney’s fees is approximately \$2500.00 less than the fee which would have been enjoyed by defendant while handling a like sum of money while he was in charge.”

Appellant’s Statement of Facts (Op. Br. pp. 4-14), was an effort to accurately refer this court to the record and to quote only portions of the agreement. The argument (pp. 54-59), has been challenged by Tidwell and the Receiver. The Receiver at pp. 18 and 19, as a part of its “Topical Statements” (the facts) volunteers their ex parte construction of the Settlement Agreement, to the end that the Receiver was not required to retain control of the managers’ cash funds, and that

the Receiver was not required to pick up from his managers rents in the sum of \$1290.59, collected before 5:00 p. m. on February 28, 1954.

An analysis of the following pages of Tidwell's brief reveals that it is primarily concerned with the construction of this Contract: pp. 10-15—Appellant's claim against Richman Trust for his November services, being an operating obligation of the trust; pp. 15-20—Tidwell's claims for escrow fees and revenue stamps; pp. 23-36—Tidwell's claims for real property taxes, utilities, and catalytic smog units payments and her right to retain rents and petty cash.

Constructive analysis and a reply to Tidwell's at least inaccurate quotation (p. 11) of the Settlement Agreement, justifies accurate quotation of at least paragraphs 4 and 5, after observing the following. The express conditions to the Settlement required the parties to execute various documents, perform various acts, and assume certain obligations; they were:

1. Mutual releases conditioned upon the entire settlement being carried out;
2. Bear their expenses. (expenses whether of litigation, the escrow or some other expense being undefined);
3. Dismiss the lawsuit with prejudice.
4. and 5. will be quoted.
6. Terminate the Trust.
7. Tidwell given the option to buy or sell a one-half interest for \$600,000; \$100,000, on or before February 26th, and the balance of \$500,000 through

escrow on or before May 1st. (Subject, of course, to paragraphs 4 and 5).

8. Tidwell required to elect on or before February 25th, and purchaser deliver the \$100,000 by February 26th. (Tidwell elected to buy).
9. Parties execute whatever is necessary to carry out the terms of this arrangement.
10. Each party take such steps as he or she deems necessary to protect his or her legal position prior to May 1, 1954.

Paragraphs 4 and 5 are follows: (R. 140-141).

- “4. A stipulation shall be entered into that the receiver be relieved as of February 28, 1954, and whoever buys shall be entitled to all receipts and shall assume all operating obligations of the Richman Trust from March 1, 1954 on or until the re-appointment of a receiver as might occur under 7 (c) hereof. (Underscoring ours).
- “5. The receiver shall file his report and after the payment and/or provision for all of the receiver's claims and expenses and operating obligations of Richman Trust to February 28, 1954, any funds remaining shall be divided equally between Mrs. Tidwell and Mr. Richman.” (Under-scoring ours). (R. 140).

Paragraph 4 specifies no hour at which the buyer would be entitled to “all receipts” from the 400 apartments, contrary to the purported quotation of the paragraph appearing top of page 11 of Tidwell's brief. In accordance with the paragraph a Stipulation was exe-

cuted (R. 54), which specified the time as being: "5:00 o'clock p. m. Sunday, February 28, 1954", being the end of the month, when Tidwell would be entitled to "all receipts from March 1, 1954". It is apparent that the Receiver was to collect the "receipts until 5:00 p. m.", paragraph 5, which requiring him to report and after payment and/or provision for all of the (1) Receiver's claims; and (2) Receiver's expenses; and (3) operating obligations of Richman Trust to February 28, any funds remaining shall be divided equally between Mrs. Tidwell and Mr. Richman. When one further considers the Stipulation the parties executed on February 26th (R. 54), the court Order pursuant to the Stipulation (R. 55), and the Escrow Instructions executed on the same date by the parties and their attorneys, it is more apparent. (R. 799). The Receiver argues (p. 18) that the petty cash funds in the hands of the managers, totaling \$785.00, was being purchased by Tidwell, and the trial court, he argues, so determined. Thence the Receiver argues that the rents collected by the managers before 5:00 p. m. were not capable of being retained or collected by him because "the banks were closed and he had no safe". Although safes were available in the apartment houses (R. 910). Further, he argues, "it appeared that these monies represented payments by tenants in advance," there being no evidence to support the assertion, (p. 19). Tidwell argues that the Stipulation of the parties terminating the Receiver's active duties "with the exception of money in bank and now under the control of the Receivers" or "excepting funds in bank and under the control

of the Receivers as of 5:00 o'clock Sunday, February 28, 1954", as the parties expressed themselves on the two different occasions in the Stipulations, that: "these phrases were interpreted by the Receiver and his attorney to mean that he was only to keep money in any bank account under his control." (p. 33). Such a construction ignores the escrow instructions which provided there be no proration of rents. It ignores the specific designation of 5:00 o'clock p. m., as being the time when the Receiver would cease to actively make collections and obtain "receipts". It renders the words: "and under the control of the said Receiver" of no effect, since naturally a Receiver controlled the receivership bank account. Further, it ignores one of the signers of the Stipulation own orally expressed interpretation of this Stipulation. This attorney, Mr. William P. Camusi stated, when arguing the question (R. 670), "It was conceded on all sides that all assets, except money in the bank or under the control of the Receiver at that time were to be turned over to the plaintiff, and they were turned over." The attorney's asserted concession is and has been the issue on these items.

B. Appellant's November Fees.

Tidwell affirmatively seeks (p. 10) to deprive Richman of the reasonable value of his services fixed by the trial court as being \$1862.60, arguing past mulcting of thousands of dollars and excessive fees, although admitting net worth of the trust (p. 14), as being \$1,200,000. Her error is that at the time of the settlement

motion for new trial was pending and the trial court stated it anticipated an appeal. She was not required to settle and neither party would thus have been required to execute the Mutual Release of each other or dismiss with prejudice, as they were required to under the terms of the Settlement. Tidwell's further error is her assertion that Richman's claim was against Tidwell for the value of his services or the agreed fee under the terms of the trust. His claim was against Richman Trust only. Three distinct items were provided for in paragraph 5 of the Settlement Agreement, which were conditions to the dismissals and releases. The three items were: (1) Receiver's claims; (2) Receiver's expenses; and (3) operating obligations of Richman Trust to February 28, 1954. The only remaining Trust or Receiver's obligations after the receiver had paid out \$6,121.40 (Accounting R. 119) in accordance with the Sunday afternoon phone call by the receiver and his attorney to the trial judge (R. 427-934-935), were the Richman's agent's fee for November, 1953 set up by the Receiver in the amount of \$3104.33 (R. 120) and the taxes. The escrow expressly provided no tax proration. The smog control catalytic units did not become an obligation until they were accepted by the Los Angeles smog authorities, which occurred March 9th and June 2nd, 1954. (R. 805). The receiver testified that he carried Richman's claim against the trust for his November services on the books as an obligation of the trust. Admittedly Richman operated the trust until the Receiver took over on November 30, 1953, even before he qualified as receiver on December 2nd, 1953.

His services for operating the trust were valuable to the extent that during his tenure its assets increased from a value of \$375,000 to \$1,200,000, and he should be paid in accordance with paragraph 5 of the settlement contract out of the funds in the hands of the receiver, because the Trust contract and the value of his services is an "operating obligation of Richman Trust" accruing before February 28, 1954. The dismissal with prejudice was dated March 3, 1954 (R. 125), and the Mutual Release bears no date (R. 796), but each was required by the Settlement agreement the same as the payment of this operating obligation of Richman Trust was required.

C. Tidwell Escrow Fee and Revenue Stamps.

Tidwell asserts as errors 2 and 3 (p. 15) that she is entitled to escrow fees and revenue stamps. The assertion is made notwithstanding she and her attorneys in carrying out the agreement signed the escrow instructions on the very day — February 26, 1954, in which she agreed (R. 799A) :

"Notwithstanding the printed provisions in these instructions, I agree to pay, in addition to the buyer's costs and expenses in this escrow, all the seller's costs and expenses of this escrow and the cost of the policy of title insurance, revenue stamps and recording and filing all instruments and documents and the seller's escrow fee."

She correctly argued to the trial court in her points and authorities (R. 178), and upon oral argument (R.

821) that the Settlement Agreement and the escrow instructions must be construed together. She cited the authorities which were supplemented by appellant with additional authorities. All of her authorities she again cites to this court at pp. 16 and 17. Of course, she now argues these authorities hold, and they do, that: "in the absence of express conditions, custom determines incidental matters relating to the opening of an escrow." Here there is no proof of custom and no occasion to consider custom because the express conditions, to wit: no proration and no expenses, was specifically stated in the escrow instructions. The agreement expressly stated each party bear his own expenses, referring to their expenses of the litigation which was then being settled. If there was any ambiguity in the Settlement Agreement or Sale Agreement, the Agreement was not "superseded" or the escrow did not "control over" or "alter" or "amend", as Tidwell so frequently inserts these words in her brief; rather, the Sale Agreement was specifically clarified and not modified by the escrow instructions. Richman, as seller, executed and delivered the documents required of him and thus complied with the Agreement. The very next sentence in the escrow instructions, immediately following the last quoted terms relative to Tidwell paying the seller's costs and expenses, is the following: "These instructions are not intended to and do not amend, alter, modify or supersede any agreement outside of escrow between F. I. Richman and me and with which agreement California Bank is not to be concerned." (R. 799A). The only other agreement between the parties

was the letter agreement heretofore mentioned, which letter agreement provided many things with which the escrow, as such, was not and could not be concerned; i.e.: 1) mutual releases of all claims; 2) bearing their own expenses; 3) mutual dismissals with prejudice; 4) stipulation relative to the termination of the receivership; 5) disposition of the funds in the hands of the receiver; and 6) termination of Richman Trust. The escrow concerned itself with the buying and selling and method of payment of the half interest of Richman Trust as set forth in paragraph 7 of the Agreement. Very obviously it was not the intent of the parties that the escrow should in any manner alter, amend, or change the requirements 1 to 6 contained in the Agreement.

D. Utility Bills.

Tidwell argues and the trial court so held that the receiver failed to pay these bills in the sum of \$1,877.50. Appellant's Opening Brief (pp. 4-14) remains uncontradicted that there has been no trial on the issues of utilities and tax proration in the amount of \$4,952.77. Tidwell attempts to avoid the trial court's failure to permit a trial, or as the trial court once said, a hearing before a Master (R. 842), by assertions on page 25 and again pages 27-28 based upon R. 790, 792, that the parties had stipulated upon these items. It will be noted that Tidwell's own quotation from the June 21st hearing reveals that at most counsel for appellant stated: "Mr. Enright: If that is your proof, I will stipulate they can go into evidence." (See p. 27) (R. 788).

Counsel had previously stated concerning the utility bills in the amount of \$1877.50: "the amount, I am sure, is less than that amount." The utility and tax bills were never identified or received in evidence and the trial court stated (R. 809), concerning utilities, taxes and catalytic units: "Well, it seems that you will have some fact issues as to which evidence will be necessary unless you get together on stipulations, which don't look too hopeful." The record here is that Tidwell never had these bills marked for identification or have they ever been received in evidence. Later the June 21st record shows (R. 817) that: "Mr. Powsner: I think we ought to have these while we discuss the matter", referring to the utility bills. The hearing was then adjourned.

The next proceeding occurred on September 27, 1954, (R. 817-843). Again the parties argued the construction of the Sale Agreement and escrow instructions. Again Tidwell (R. 836) stated she desired to offer some utility bills in evidence. Objection again was made and it was pointed out (R. 837) appellant would desire to present evidence if the utility bills were received in evidence and the court sustained the objection. Then the court stated (R. 837) in reply to Tidwell's further argument: "The Court: If on the main contention I should ultimately decide you were right we will refer the whole question to a Master for the taking of evidence. Mr. Camusi: I see. The Court: But I think at this time you are bound by the Agreement." Thence the court (R. 839) stated concerning appellant's management fee that Tidwell could not

object to Richman being paid at least a reasonable fee because she had accepted the services and further: "just to keep from having laches run against her, wouldn't she find herself with what she had accepted?" With this state of the record the court took the matter under submission. (R. 842).

Concerning these same utility bills, attention is directed to the Receiver's Accounting. It will be noted that the Receiver paid each month utility bills for the five apartment houses (R. 108, 110, 114) and in February, (R. 115) the utility items of "water", "electric and power", "gas", "telephone and telegraph" in the amount of \$1307.32. Further note, the Receiver's expenditures made in March totaling \$6,121.40 which included utility bill payments to the Department of Water and Power, Pacific Telephone and Telegraph Company, and Southern California Gas Co., in the amount of \$1329.05. (R. 119).

E. Catalytic Units.

Tidwell argues (pp. 30-32) that these units should be charged against the Receiver's funds. She points out (p. 31) that the Receiver could have had them installed in December, apparently acknowledging default of the Receiver. Thence, that the units were not installed until after January 22nd. Payment did not become an obligation of Richman Trust or the purchaser of the trust property until the units were accepted, as specifically provided by the terms of the Contract for the catalytic units. (R. 802). The contract specified the time for payment. "A deposit of 10% of the above

quoted amount is required upon the execution of contract, balance of which is payable upon receipt of the Los Angeles County Air Pollution District Permit to operate". The Permits were issued (R. 805) on March 9th and June 2nd, 1954. The purchaser, Tidwell, was, under the Settlement Agreement paragraph 4, "entitled to all receipts and shall assume all operating obligations of Richman Trust from March 1, 1954 on . . .". Uncertainty exists in the record as to the day on which installation was completed. No uncertainty exists as to the dates on which payment for these units became an obligation. The permits were issued on March 9th and June 2nd, 1954. Had the Richman Trust continued, payment for these obligations would have then been required, but the parties expressly contracted that the purchaser (Tidwell), pay this obligation accruing after March 1st.

There are many other contentions or remarks contained in the Tidwell brief, such as: (p. 30) that only one of the contracts for the catalytic units was placed in evidence. This is erroneous but apparently the printer failed to print both contracts. He made the note (R. 803) "(duplicate copy attached)", which is not entirely correct because the contracts while identical in provisions and terms varied, as to designation of apartment house; and (p. 20) "The trial court permitted the Receiver to reimburse himself for the sum of \$89.20 for copies of depositions paid by him. (Order of Court R. 195)", an auditing of the amounts shown in the Order will reveal that reimbursement was entirely deducted from appellant Richman's remainder of the

funds, as determined by the trial court, or the net sum to him of \$4,974.56. This fallacious accounting, evidenced by Tidwell's draft of the trial court Order and her pending motion to this court for an Order confirming the trial court's conditional ex parte Order, require no comment. Appellant relies upon his proposed distribution of funds appearing (Op. Br. p. 66).

II. Reply to Receiver and His Attorney.

An effort will again be made to quote from this voluminous record to demonstrate the unusual occurrences and conduct in this receivership.

A. Receiver's Charge of Untrue Statements.

At pages 2 and 3 he asserts by conclusion, not only untruthfulness but incompleteness; thence he asserts a few examples. Completeness requires a review of the whole record, and this is invited. Appellant can only reply to the examples. The first is that the record was not sufficiently cited concerning the statements at the top of page 34 (Op. Br.), as to whether the Receiver was available to attend to a refrigeration breakdown occurring in February, 1954, in one of the large apartment houses. The manager testified (R. 471-):

“I started trying to get in touch with Mr. Hallberg on the afternoons of the 17th, 18th, and 19th, and was never able to contact Mr. Hallberg. About 5:00 or 5:30 on the evening of the 19th Miss Cosgrove called me and asked me if I had been trying to contact Mr. Hallberg, was something wrong with the refrigeration?”

The only diary entry of the Receiver and Miss Cosgrove appears on the 19th: "To W A (Western Arms Apartments) Re: Refrig." (R. 403A). At R. 472 the manager explained she, on the 20th, after contacting appellant, employed another refrigeration company.

"Then he (Hallberg), called me on the phone.
Q. On the morning of the 20th? A. Yes, I don't know where he was, I just judged he was at the office."

Thence the Receiver charges that several items set forth on page 42, Op. Br., as being a part of the Receiver's accounting, are not a part of his Account. The first amount was a "salary expense item of \$1628.18 R. 410)." Bearing in mind this Receiver asserts special accounting experience it is difficult to see why he should charge untruthfulness unless it be for the purpose of prejudicing appellant before this court. All the Receiver had to do to ascertain the \$1628.18 salary expense he incurred was to add the following items for salaries appearing in each one of his monthly itemizations of disbursements:—R. 110—\$450.00 and \$25.00; R. 114—\$450.00; R. 116—\$600.00; R. 119—\$103.18, totaling \$1628.18, and each being designated in his own itemization as "salaries and wages", except the last, being designated "Jean Findeisen—Office". The same procedure for petty cash items.

Additional improper examples are: That appellant's statement (Op. Br. p. 44) asserts that the Receiver in no manner accounted for an insurance refund of \$158.00, and that he turned it over to Tidwell (citing

R. 664). The record shows (R. 664) that Tidwell's attorney stated as follows: "If they think, defendant Richman thinks he is entitled to any of this money, that is something for the plaintiff and defendant to fight out in their lawsuit." The record from that point to R. 670 establishes that not only did the Receiver fail to report this refund in his accounting, but further, Tidwell admitted the right to a refund was "turned over to Mrs. Tidwell". Thence the court stated:

"Let's mark that down as one item to be considered in the pretrial that is coming up."

Thence, again at R. 671 the court directed:

"That is where I think we should consider it, instead of considering it with this Receiver who was subject to an Order."

Insofar as the Receiver is concerned it is an admitted failure on his part to acknowledge anywhere in his accounting that a refund was payable upon the \$400.00 he reported in his accounting as having been expended by him. (R. 113)

Another asserted untrue statement is: that the Receiver intended to delegate his receivership duties to Miss Cosgrove (the maiden name of his wife), R. 380 was correctly cited, it is as follows:

"Q. At the time you were requested to act as Receiver in this matter by the Court you had then intended to delegate most of the work to Miss Cosgrove, is that correct?

“A. I had intended to delegate the housekeeping to Miss Cosgrove.”

There is no uncertainty of the intent of Hallberg to turn over the performance of the important receiver-ship duties to his wife when R. 380 is supplemented by R. 433-4, where he admitted that he went out on December 1st, or during the first three days after the Decision of November 30th to appoint a receiver, and introduced Miss Cosgrove to the managers in the following manner:

“Q. What did you tell the managers?

“A. I told them she was going to act for me.”

See also R. 264-265, the Receiver’s direct testimony explanation of rendition of services by Miss Cosgrove.

The fiduciaries Hallberg and Whyte, as a Receiver and an attorney, were supposed to be impartial in this transaction. Their failure to so act is evidenced by their improper charge of making untruthful statements.

B. Receiver’s Preliminary and General Statement.

This generalization of the facts (pp. 4-9), is substantially correct except for the following conclusions:

1. The Receiver and Whyte assume that the Receiver had a right to act by the Decision of the Trial Court on November 30, 1953. The Receiver did not have this right until he filed his bond and qualified on December 2, 1953. On, before, and after

that date appellant was pleading with the trial court to fix the amount of supersedeas bond which was denied (R. 32, 216). Before qualifying they took over the bank account of the appellant, had collected monies from the managers of the five apartment houses and instructed the managers to pay the rents to them (R. 553-554). The Trial Judge aided the Receiver's attorney, according to their records, (R. 555), in obtaining a Receiver's bond; thus, it is improper for the Receiver and his attorney to claim fees from "December 1st, 1953". 2. Whyte's conclusion that his time "was devoted to defending the Receiver against Richman's attack," appearing page 6, is likewise an improper conclusion. The Receiver had refused to state what compensation he desired, and all the acts, or non-action, set out in the Opening Brief, had to be examined to determine what fee, if any, he was entitled to receive. Further, the attorney sought \$3,000, plus extraordinary fees in an undesignated amount. Is it proper for the Receiver to now say that appellant forced him to defend himself when appellant objected to certain items of his Account, after having sought to find out from the Receiver what fee he wanted, thence went forward on the Court's statement that all the facts should be developed—to develop all the facts? 3. At pages 7 and 8 the Receiver and his attorney assert there is no attempt to surcharge the Receiver and, therefore, appellant's errors No. 3 and 8 should be disregarded, citing and quoting R. 617-619 and R. 685-686. As stated (Op. Br. p. 66) appellant sought an Order conditionally surcharging the Receiver's account with the petty cash in

the amount of \$785.00, the February rents in the amount of \$1290.59, the compensation insurance refund in the amount of \$158.00, the court having, in fact, surcharged the Receiver in the amount of \$2027.25, being a premature payment by the Receiver on one of the apartment houses; the condition being that these amounts be a charge against Tidwell's right to a portion of the funds remaining in the hands of the Receiver, subject to their propriety being determined when and if it became necessary for Tidwell and Richman to litigate their Settlement Contract of February 19, 1954. (R. 139-144). The Receiver's partial quotation (pp. 7-8), avoided stating the following:

“Mr. Enright: I intend to and seek to charge the Receiver personally and submit that the charge should be against the fund.

“The Court: Well that means against the \$30,000 which he still has in his possession. . . .

“Mr. Enright: Could I have read? (The record read).

“Mr. Enright: Certainly, Your Honor, I stated that there is no need for this Receiver having to bring an action against the plaintiff to recover their money, that the plaintiff has received the benefits of and added to the fund; rather, charged to the plaintiff.” (R. 619)

Further, the Receiver failed to quote the portion of the record (p. 685), appearing before Mr. Whyte's statements in the record on that page which he has partially quoted in his Brief, page 8. At that point, in behalf of appellant, it was stated:

“Mr. Enright: I would merely point out the Court Order was that the Receiver retain monies under his control, the Order of February 26, 1954. This is an item of \$1290.59 that he did not retain. I am concluding the evidence on the point. Whether it is relevant or not, I can only state what the Court Order was.” (Op. Br. pp. 49-54).

C. Receiver's Topical Statements of the Case.

a. Receivers Representations.

At pages 9 to 11 the Receiver argues that he merely was “chiming in” when he stated in reply to the Court’s statements as to his experience and availability: “That is correct”. Appellant refers to his Opening Brief (pp. 16-22), which was and is an effort to state the record by quoting the record only. Appellant replies that he, at least, assumed the Court did not think that it was appointing the wife of Mr. Hallberg to supervise five managers in the operation of 400 units contained in five apartment houses which the parties themselves by Contract agreed had a value of \$1,200,000.00. (Settlement Agreement R. 141). In fact, apparently during the prolonged, intermittent hearings the Court was embarrassed as a result of its appointment, although it completely exonerated the Receiver in its ultimate Decisions. For example, the Trial Judge volunteered during the hearings, having failed to act upon the Petition to Disqualify:

“The Court: Yes, he came in at my request. I called him and asked him if he would be available to serve as Receiver. He wanted to know what it

would involve, and I told him in a general way what it would be. I made the call because, although my acquaintance with him has not been personally very extensive, I have known him casually and was a neighbor of his, and I have known of properties that I thought he was managing for an aged relative. It turns out from the deposition that it was his own property. I had known from just casual conversation that he had had a responsible part in the management of considerable income property in Chicago. I had thought for a term of years. And it turns out now it was just a little over a year, if the deposition is right." (R. 257-258).

Long after the appointment and during the course of the hearing, it was discovered that the Receiver's management of apartment property was as follows: During the depression in 1930-31 he was employed by Gus Eich who was a bondholder of certain bonds issued by a bank at Chicago. (R. 378). Secondly, as now acknowledged by the Receiver in His Brief (p. 16):

"About December, 1949, he and Mrs. Hallberg purchased a 16-unit apartment house in South Pasadena which they held for approximately eleven months and in which they installed Mrs. Hallberg's mother as manager."

As stated by appellant's counsel on November 30th, when the Trial Court called counsel in to deliver to them its Decision, holding that the trust was voidable, he relied upon the Court's integrity in selecting and appointing a Receiver of experience and integrity. He

then assumed by Mr. Hallberg's statement: "That is correct", that Mr. Hallberg was an experienced manager of Los Angeles area income property; that he did not mean that a place of business in Pasadena would be a four-family flat rented to strangers.*

As stated in the Opening Brief, if the representations made by the Receiver to his former neighbor, the Trial Judge, on the week before the Decision, (none of which appellant has been privileged to inquire concerning, and which must be accepted upon the volunteered statements of the Trial Judge), then at least the Receiver's hands are so unclean that they should be considered when fixing his fees and do not justify a fee of \$2,000 per month, when he was then expending a 40-hour work week as a permanent employee of the County of Orange at a salary of \$355.00 per month.

b. Petition to Disqualify.

The Receiver's Topical Statement is an argument and not a statement of facts. Appellant here refers to its Opening Brief pp. 22-23. The Court having closed the matter by failing to act and stating: "It is closed" (R. 456), there is no justification for the Receiver to draw the conclusion "it would have been wholly unnecessary" to call the Trial Judge as a witness. A litigant who, according to the Trial Judge, has never taken any trust funds (R. 212), and who is the half

*In deposition proceedings the Receiver testified (R. 872) that his residence and business address was 1202 Seaview, Corona Del Mar (Orange County). The Receiver had resided at this address since 1952. (R. 371). His business address was at Corona Del Mar long before the November 30, 1953 representation that he had a place of business in Pasadena. (R. 215).

owner of assets of \$1,200,000, should be permitted to inquire into the circumstances surrounding the Trial Judge who stated he would consider fixing supersedeas bond (R. 216, 217, 31), but instead participated in obtaining a Receiver's bond (R. 555) to make effective the appointment of one who represented to the Judge he had acted as Receiver for years, had managed extensive properties in the area of the \$1,200,000 assets, and had a place of business, when each statement was at least an equivocation, if not a false statement.

c. Receiver's Availability and Earnings.

The Receiver, at page 12, now acknowledges his County of Orange, 40-hour week, 8 hours a day, Monday through Friday employment. This, he and his wife never disclosed to anyone (R. 526) before the termination of his active duties, or until deposition proceeding after he filed his accounting. Thence the Receiver relies upon the volunteered statement of the Court (R. 258), that appellant had not devoted his entire time to the acting as agent for the Trust of the same properties, he being one of the Trustors, therefore, the Receiver could take, we assume, full time employment at the County of Orange. The record will not justify such a volunteered position. The Receiver stated to the Court and it stated to the parties that the Court had interviewed Mr. Hallberg the week before its November 30th decision and had been advised that the Receiver was available to take over management of the Trust property. The Receiver qualified on December 2nd, and on the following day as a result

of a previous application was employed to start full time work for the County of Orange on Monday, December 7th. He should be compensated proportionately upon the basis of his earnings at the County of Orange, being \$355.00 per month (R. 328), or his immediately preceding employment by Narmco Corp., a fishing pole manufacturer, at \$350 per month (R. 364), or his Morgan Construction Company drawing account of \$100 a week from May to December, 1951. Perhaps consideration should be given to the Receiver's assertions that he had a salary of \$10,000 a year in 1947 while employed by Refrigeration Corporation until "they got into financial trouble back East" (R. 875), although he now states in his Brief: "About 1949 Hallberg began having trouble with his back—for months he was in bed and in the hospital and accordingly his employment record from then until the time of the Receivership was spotty." (p. 15). But, yet we are left in doubt because he states (p. 16), that he spent eleven months, commencing December, 1949, doing: "hard physical work on the premises, including painting, carpeting, hanging doors, laying floor tile, and repairing the roof" of the 16-unit apartment house he and Mrs. Hallberg owned during the period. Further examples of the Receiver's evasiveness when asked concerning his qualifications by experience and previous earnings are: the Receiver had explained that he made an investment of \$18,000 (R. 365), in Morgan Construction Company, and had a drawing account during the period May or June to December, 1951, of \$100 a week; his answer when asked if he knew a G. T.

Gillian was "I know of him", he explained that he was a helper or gave aid in rendering services as an efficiency expert. His assistance was organizing a group but:

"at that time I was not capable of any sustained work.

"The Court: You had some physical difficulty?

"The Witness: Yes, I have been bothered for several years with a bad back that incapacitated me; over months on end I was in bed and the times I got up were limited. I didn't do any physical work and I finally had an operation." (R. 366-367)

Secondly, the effort upon deposition of the Receiver and his attorney (R. 881) to not disclose the details concerning the Receiver's County of Orange employment, when he should have been himself attending to the new duty of operating the apartment houses containing 400 units. The trial judge criticized appellant stating the Receiver was treated like an "embezzler" (R. 859). With such an admitted actual employment record, appellant asserts no consideration should be given to the Receiver's claims that he made large salaries before 1951.

d. Receiver's Services.

The Receiver asserts he handled "the myriad problems which arise in connection with the operation of five large apartment houses" and enumerates some of the problems. Reference is made to Appellant's Opening Brief (pp. 29-32), or to the Receiver's direct testi-

mony (R. 263-270), where he explains how he delegated the problems involving the apartment houses; or to his qualified admission on cross-examination of his intention to act as Receiver through Miss Cosgrove, his wife, (R. 433-434) to determine how he performed the trust of a receiver.

The Receiver, at page 17, asserts that he "set up a new and improved bookkeeping system" (without a journal (R.274).) At another point the Receiver and his attorney attempt to explain why they were not able to comply with the Court Rule requiring a Receiver to make a report within 60 days. The sufficiency of this "new" and whether they were "improved" books, is substantially answered at R. 46 where respondent Whyte by Affidavit states why the accounting had not been filed,—when seeking an extension of time.

"Affiant has been informed by Mr. Roy Harrison, said Receiver's bookkeeper, that said Harrison has had considerable difficulty in assembling the accounting data which must be included in said report, notwithstanding the fact that he has been working up the same for a number of days. Said Harrison has further informed this affiant that he will be unable to have said accounting data in final form prior to some time the week commencing January 31, 1954."

The fact is that the report was not prepared or filed, notwithstanding the Receiver's asserted bookkeeping experience and the availability of the services of a bookkeeper and attorney.

The Receiver admits that appellant charges him with violation of the Court Order terminating his active duties "5:00 o'clock p. m. Sunday, February 28, 1954", having previously denied that the three items of \$785.00 petty cash, \$1290.59 rents which the Receiver's accounting reported as being \$2,000 (R. 90), and prepayment of \$2,027.25 to the benefit of Tidwell, and thence he attempts to justify his *ex parte* interpretation of the Settlement Agreement on these items. He first states that petty cash in the possession of his managers was not money "under the control of the said Receiver", rather, it was an asset of Richman Trust: "and became the property of Mrs. Tidwell". The Court Order was that he terminate his active duties at 5:00 p.m. He did not take possession of these monies under his control, he states, "for the good and sufficient reason that they were part of the working properties of the buildings". He fails to acknowledge that he, in his accounting, charged himself (R. 104) with \$785.00, being received, but before he terminated his active duties he issued checks all in February, 1954 to the five different apartment house managers for the following sums: \$91.18, \$95.73, \$18.61, \$54.81, \$65.08 (R. 115), to re-establish the petty cash fund of \$785.00. These monies were drawn from the bank account.

Reference is here made to the Reply to Tidwell's Brief analyzing the Settlement Contract, the Escrow Agreement called for by the Contract, the Stipulation of the parties executed pursuant to the Contract, and the Court Order based upon the Stipulation. Suffice it

to here state the Receiver, by law, is required to be impartial. The Receiver and his attorney admit that on the Sunday afternoon, after their golf game, they called the Trial Judge by phone, advising him that Mr. Enright and Tidwell's attorneys had disagreed concerning certain other expenses incurred in the operation of the receivership. (R. 428). An impartial Receiver should have at least given appellant an opportunity to submit his position to the Court upon the replenishing of this petty cash fund and upon the other items involved in this appeal.

Concerning the rents collected by the managers before 5:00 p.m. February 28th, at which hour he was to terminate his active duties, the Receiver asserts (p. 18) he could not maintain his control over these funds or take possession of them because "the period in question being a weekend the banks were closed." The Receiver justifies his failure to act until 5:00 p.m., stating the Trial Court decided, (Citing R. 182-183), that these rents belonged to the purchaser Mrs. Tidwell,—he acted before this decision now on appeal. At least the litigant was entitled to the Receiver continuing his active duties and collecting these monies, since he states he came to Los Angeles from Orange County on weekends, and this was a weekend, until the Trial Court decided the question. The Receiver, thirdly, justifies his payment of \$2027.25, because it would become due March 1st. He relies upon the Trial Court's defense of him when it, in its Decision, states it was reasonable to pay in advance. He admits appellant correctly states, in his Opening Brief (R. 630-631),

that the Receiver had never previously prepaid these installments; in fact, they were days delinquent. Further light is thrown upon all these items by R. 632, which enumerates a great number of check stubs dated February 27th and 28th, by the Receiver, when he was performing his duties as Receiver on weekends, he could have taken possession of the funds "under his control"; rather, obviously he intended to and did benefit Tidwell. The Receiver's conclusion that not one penny of the three items "was lost or dissipated", is true insofar as Tidwell and the Receiver are concerned, but to date they have been more than lost (appellant's expenses in this proceeding considered), insofar as appellant is concerned.

e. Accounting Services and Experiences.

Appellant relies upon its Op. Br. pp. 32-34, the admissions in the Receiver's Brief, and other points throughout this Reply.

f. Refrigeration Break-Down.

The Receiver, at page 21, in no manner attempts to refute his own testimony and diary which are quoted at page 34 Op. Br. Suffice it to again state that the litigants were led to believe that a full-time court Receiver had been appointed, who would be available each day to attend to emergency problems such as refrigeration breakdowns when they occurred. Admittedly he was not available, asserting he visited the apartment houses two days after the break-down and found the refrigeration system working. Miss Cosgrove

testified she, upon discovering the problem, phoned Mr. Hallberg at the Orange County Assessor's Office and that she had not told anyone he could be reached there. (R. 526).

g. Air Pollution—Criminal Citation.

The Receiver asserts that "it is only necessary to state the facts fully and accurately" (p. 21), in his effort to explain why these Contracts, executed before his qualifying as Receiver on December 2nd, were not performed until after February 1st. His statement (pp. 21-24), is substantially in accordance with appellant's statement (pp. 35-37), except in two particulars. The Receiver attempts to justify his nonaction because "Harrison having failed to carry out the instructions given him about the first of the month", asserting: (p. 23) "On January 22, 1954, Hallberg found the drawings for the air pollution control equipment at his office at the Oliver Cromwell". (R. 642). A reading of R. 642 reveals:

"The next time he (Harrison) was able to get in touch with Mr. Hallberg was when he came to the office of the Receiver at the Oliver Cromwell on January 22nd. Mr. Hallberg went through his briefcase and found the Application and approved plans. That Mr. Hallberg then dictated the letter for Mr. Harrison to send to the Air Pollution Control, Inc., which Mr. Hallberg signed, enclosing the Plans and Specifications and the Approval of the Application to Air Pollution Control, Inc."

The letter itself appears R. 646. Smog control was and is a serious metropolitan Los Angeles problem. Had the Receiver been attending to the operation of these apartment houses each day, instead of Friday afternoons and weekends such as this particular January 22nd, the smog control units could have been installed when the materials were available (R. 710), in December, provided, of course, the attorney for the Receiver had reviewed the Contracts before December 30th—being twenty-eight days after the Receiver qualified. Thence appellant would not now be resisting allowance of attorneys' fees for services rendered to one of the managers when she, with appellant, were charged with a crime, because of the Receiver's neglect, in the Los Angeles Municipal Court.

h. Receiver's Fees.

At pages 24-28 the Receiver again relies upon the Trial Judge's excusing his non-compliance with its local Rule 18(C), in an effort to reply to appellant's Statement of the Case (Op. Br. p. 37-43), thence he asserts that: "A licensed real estate broker and real estate appraiser", (not a property manager) testified on direct examination that a 5% of gross income would be a reasonable fee. He does not deny that at R. 313-14 this same witness produced, on cross-examination, the Los Angeles Realty Board Schedule of Management Fees, which provided: "Over \$2,000.00 the charge shall be 3%", which 3% includes all the expenses of the manager, e.g.: Harrison, bookkeeper, etc.; thence the Receiver (pp. 26-27) extensively quotes the Trial

Court's justification of the Receiver's fees which, among others, was that the Receiver was treated as though "he were accused of a crime". (R. 858). Appellant stands upon his Opening Brief statement and argument. Appellant asserts that the record will not justify the Trial Court's criticism of mistreatment of the Receiver, but that it will demonstrate a gross abuse of discretion in allowing the fees that were allowed. As previously noted at the opening of this Brief, we have spelled out for the Receiver and his attorney how they can trace the many expenditures made by the Receiver, as partially enumerated at page 42 of the Opening Brief; and further, for example at R. 606-7. The Receiver contends at page 27 that he should receive \$6,000.00, or \$2,000.00 a month, because Richman's fee as Agent would have been greater. Appellant was one of the trustees and trustors. The facts are that appellant during the period 1946 until the receivership increased the trust assets from \$375,000 to \$1,200,000. (R. 724). The law is that Receivers should be moderately compensated; are not entitled to be compensated upon the basis private industry compensates. We again quote from a Court of Appeals, as we did (Op. Br. 62): "The Supreme Court (U. S.) has given notice on more than one occasion that Receivers and attorneys engaged in the administration of estates in the courts of the United States and in litigation affecting property within the jurisdiction of those courts, should be awarded only moderate compensation, and that many of the allowances heretofore awarded have been too high." The Receiver's reliance upon California cases

(pp. 35-37) do not disagree with the Federal Court statement of the rule.

The Receiver's plea that he had the burdensome task of taking possession of unknown properties and familiarizing himself with them, installing his system of management and setting up his books, and then only three months later being compelled to close the books, might have merit had the Receiver, in fact, performed these services instead of becoming a full-time employee of Orange County. There is no evidence in the record he closed his books, or ever rendered a report from his books; rather, he filed an accounting which is a tabulation of receipts and disbursements and it is incomplete (to the extent at least he thought that he failed to collect rents of \$2,000.00, which were in fact \$1290.59); it failed to reveal surrender of the petty cash fund and the workmen's compensation deposit refund to Tidwell, and, generally is a mere scheduling of receipts and disbursements from a checkbook.

i. Objections to Receiver's Report.

Respondent-Receiver fails to answer the specific charges (Op. Br. p. 43-44), pertaining to the Receiver's Report. By Footnote 7, he again by conclusion asserts: "The inaccuracies and unreliability of his (appellant's) brief." This conflict can best be resolved by a reading of the Receiver's Report commencing R. 75, and there observe for example under Item 5, (R. 77) how the Receiver alleged his attending to receivership matters as having been "performed by him or his agents", which, upon hearing, disclose that substan-

tially all acts, were performed by Miss Cosgrove. (R. 263-270). The specific assertion of inaccuracies and unreliability refers to the \$158.00 refund upon the \$400.00 workmen's compensation insurance deposit. Neither the Report or Accounting anywhere makes reference to this asset which the Receiver, *ex parte*, determined was an asset of the purchaser Tidwell. Tidwell's counsel asserted (R. 670-671), the refund was turned over to Tidwell. The amount was uncertain at the time of the filing of the accounting but, the least the Receiver could have done was to report and account for it as being an undetermined refund. That he failed to do this likewise can only be ascertained by an examination of his Report and his Schedules of receipts and disbursements.

j. Attorney's Fees.

The Receiver asserts (pp. 29-33), appellant "does not challenge as reasonable the fee of \$1800.00". A reading of Specification 7 (Op. Br. 48), Statement of Facts, (Op. Br. pp. 44-46), and Summary—one sentence argument (p. 66), will demonstrate the impropriety of the contention. Again, attorney Whyte asserts he was "defending the Receiver" (and apparently himself), after appellant objected to a \$3,000.00 attorney fee, plus extraordinary, and objected to the accounting items especially those heretofore frequently discussed. Appellant developed the Receiver's background, experience, qualifications, and availability after the court had suggested the Receiver ask for reasonable fees, contrary to the local Court Rule, and

after the Receiver had refused to state what fee he would consider reasonable. As pointed out in the Opening Brief, this Receiver and his attorney were fiduciaries who were required to fully disclose and carry the burden of explaining their Account and justifying the fees they sought. As to whether the attorney is entitled to be compensated for expending his time in going out with the Receiver to take possession of the apartment houses and taking over the bank account, before qualifying, aiding in the accounting, and many other alleged services may *de novo* and originally be determined by this court. In *Campbell v. Green*, 112 F. 2d 143, the rule was stated concerning the power of the Courts of Appeal concerning attorney fees:

“The court, either trial or appellate, is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and *may form an independent judgment either with or without the aid of testimony of witnesses as to value.* (Emphasis added); Citing C.J.S. Attorney & Client, Sec. 191(d).

Other Federal court decisions following the rule are: *Mercantile Commerce Bank & Trust Co. v. Southeast Arkansas Levee Dist.*, 8 Cir., 106 F. 2d 966; *Merchants' & Manufacturers' Securities Company v. Johnson*, 8 Cir., 69 F. 2d 940; *Blackhurst v. Johnson*, 8 Cir., 72 F. 2d. 644; *Federal Oil Marketing Corporation v. Cravens*, 8 Cir., 46 F. 2d 938; *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 8 Cir., 194 F. 2d. 846 (1952 Certiorari denied 343 U. S. 942).

Appellant submits that even the original \$1,000.00 allowance of the Trial Judge is excessive, the nature and manner of performance of services rendered by the attorney for this Receiver, this whole record considered.

Conclusion

The clear, apparent and obvious errors of the Trial Court's construction of the Settlement Agreement, after it had stated, at an adjourned pretrial hearing on September 27, 1954, that if it changed its ruling as to the admission of evidence, it would appoint a Master to receive evidence, forces appellant to charge gross abuses of judicial discretion by the Trial Court throughout this proceeding. Appellant, whom the Trial Court referred to as "a very well educated and capable lawyer" (R. 8), and his counsel, have never observed such abuse of judicial discretion. Their concept of judicial discretion is as set forth in *Langnes v. Green*, 282 U. S. 531, 541; 51 S. Ct. 243; 75 L. Ed. 520, 526:

"The term 'discretion' denotes the absence of a hard and fast rule. The *Styria v. Morgan*, 186 U. S. 1, 9, 46 L. ed. 1027, 1033, 22 S. Ct. 731. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

From the inception of the receivership the Trial Judge arbitrarily exercised his discretion. He refused to fix the amount of supersedeas bond, rather, he directed the proposed attorney of the Receiver (who had then been unable to post his bond), to advise the bonding company to write the Receiver's bond and the premium would be paid out of the estate. Supersedeas is discretionary but the discretion must not be arbitrary. Here, the extraordinary remedy of receivership was imposed upon a successful member of the Bar, who had also successfully engaged in many business ventures; who was a half owner of the Trust and as Agent for the Trust had, during his agency, substantially increased the Trust's assets and who had admittedly not appropriated any trust funds and at most, was charged with obtaining an undue advantage because of his fees. In sequence, the Trial Judge extended the Receiver's time to comply with the local court rules for filing his Report; the Trial Judge instructed the Receiver, contrary to long established local rule, to ask for a reasonable fee. After the Report was filed and when appellant questioned the correctness of the representations, the Trial Judge stated had been made to him before the Receiver was appointed, and after appellant had objected to the Report because of the various benefits the Receiver had permitted Tidwell to obtain, the Trial Judge advised appellant: "No evidence will be taken concerning the appointment of the Receiver in this action." (R. 157). Throughout the proceedings to determine reasonable fees, the Trial Judge constantly came to the aid of the

Receiver when it became necessary to establish the facts pertaining to the Receiver's experience, qualifications, previous rate of compensation, and truthfulness of his representations. At the inception of the proceedings (R. 256), the Trial Judge asked appellant's counsel: "What do you think is reasonable, Mr. Enright?" After counsel explained the events which caused him difficulty in suggesting a fee, the Trial Judge stated: (R. 261) "We had better take full evidence on what he (Receiver) did." Appellant still desired to avoid such extensive hearings and shortly thereafter counsel (R. 265-267), proposed a fee thought to be reasonable. Long thereafter, when the facts were being developed, the Court suggested to counsel that a career should not be made out of the case, and the Receiver was asked what fee he would consider reasonable (R. 416), and he replied he would rely upon the Court to fix his fee. The facts pertaining to the representations made by the Receiver to the Trial Judge were only partially developed because the Trial Judge failed to rule on the Petition to Disqualify, since he was a witness to the representations. There is no conflict in the evidence as to the Receiver's earning capacity at the time he qualified by posting bond and taking the oath to act as Receiver. His salary as an employee of the County of Orange, Assessor's Office for a full work week was \$355.00 per month. Immediately before being so employed, his salary as an employee of Narmco, a manufacturer of fishing poles, was \$350.00 per month. Upon this state of the record, appellant contends that the Trial Judge grossly abused

his discretion when he awarded the Receiver a \$6,000.00 fee for less than three months services. Yet the Trial Judge states in explanation of such order (R. 858):

“Mr. Hallberg asked for less than he got out of the court. I increased, not the prayer of his petition, but the tenor of his testimony, because I felt that he had not given any account to the element of having to account so fully in court, as well as by the accounting which he had prepared and filed.”

The Trial Judge then discloses what appears to be his personal prejudices when he states (R. 859) that the Receiver was treated like an embezzler; and (R. 863) that this Receiver would not care to act as Receiver again because of the “criticism and acrimony which attends being a receiver”.

There is an absence of what would be “ . . . equitable under the circumstances and the law, . . . ” within the *Langnes v. Green* definition of discretion, in the November 19, 1954 Order of the Trial Judge fixing fees and directing distribution of the funds remaining in the hands of the Receiver. This is likewise true of the *ex parte* conditional Order made by the Trial Judge on September 9, 1955, which we now understand has been approved by this Court. If it is possible to reconcile the addition of the September 9, 1955 accounting procedure Order with the remainder of the November 19, 1954 Order, such reconciliation can only be had if we assume that the amounts specified throughout the November 19, 1954 Order are to be

changed to the amounts specified in the September 9, 1955 Order.

The discretion of the Trial Judge was improper concerning the construction of the Settlement Agreement and division of the funds in the hands of the Receiver, for the following reasons: The Court improperly: 1) awards Tidwell the \$785.00 petty cash funds the Receiver had under his control; 2) awards Tidwell the rents collected by the Receiver's managers before 5:00 p.m. on February 28, 1954 in the amount of \$1290.59; 3) awards Tidwell a compensation refund in the amount of \$158.00; 4) awards Tidwell one-half the utilities in the amount of \$1877.50; taxes in the amount of \$4,952.77; catalytic smog units in the amount of \$2600.00, or a net to Tidwell of \$4715.13. The Court once exercised its discretion before decision by stating evidence could not be received concerning utilities and taxes, because Tidwell was bound by the written agreement and escrow carrying it out, and then stated if it changed its mind it would appoint a Master to take evidence. To construe the Settlement Agreement, Stipulations, and Escrow Instructions of the parties in such a manner was a gross error of law and not supportable by the "the reason and conscience of the judge", as those words are used in *Langnes v. Green*. The Court further had no jurisdiction or power to construe the Contract except for the purpose of conditionally surcharging the Receiver, because this was a Contract made by the parties litigant after judgment and pending motion for new trial or a new and different judgment, which Settlement Contract was not

before the Court except to the extent the Receiver himself *ex parte* construed and acted under the Contract when leaving the insurance refund, petty cash funds and the rents for Tidwell's agent Udall to obtain.

Appellant prays that the Order and Judgment of the Trial Court dated November 19, 1954, as conditionally modified by the Order of September 9, 1955, be reversed; that this court determine that the Settlement Contract of the parties requires the conditional surcharging of the Receiver, in accordance with the accounting set forth on pages 66, 67 and 68 of Appellant's Opening Brief; and that this Court fix the amount of fees payable to the Receiver and the amount payable to the attorney for the Receiver, both fees to be subject to the costs incurred by appellant upon this appeal.

Dated: October 4, 1955.

Respectfully submitted,
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and
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